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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 70-355

Number ~~1302~~

Charles E. Lowe, Petitioner

Versus

United States of America

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J. D. De Blieux
De Blieux, Guidry & Lowe
P. O. Box 3574
Baton Rouge, Louisiana 70821

For Petitioner

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JURISDICTION

Petition is made for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, relative to the decision of that Court in Charles E. Lowe v. United States of America, _____ F2d _____, rendered and entered March 31, 1971. (Opinion attached.)

Jurisdiction to review the judgment below is conferred by 28 USC Sec. 1254(1).

Certiorari is sought that a conflict between the Court of Appeals for the Fifth Circuit and the Court of Appeals for the Sixth Circuit might be reviewed and resolved: The Fifth Circuit holding that a serviceman is barred from a claim under the Federal Tort Claims Act if the claim is even incident to service; whereas the Sixth Circuit holding that such a claim is barred only if it arises out of military duty.

Under the Sixth Circuit standard, petitioner could pursue his claim, but under the Fifth Circuit standard he can not.

Certiorari is further sought that the constitutionality of the exclusion as interpreted by both Circuits might be reviewed in the light of the Fifth Amendment.

QUESTIONS PRESENTED

I. Whether a serviceman is excluded from a claim against the government under the Federal Tort Claims Act, 28 USC Sec. 1346(b), arising out of surgery undergone during military service, but not arising out of or in the course of military duty;

II. Whether, consonantly with due process of law, a serviceman can be excluded from a claim against the government under the Federal Tort Claims Act, 28 USC Sec. 1346(b), solely on

the basis of his military status, either in military service or in furtherance of military duty.

STATUTES INVOLVED

1. Federal Tort Claims Act, 28 USC Sec. 1346(b)

> Subject to the provisions of Chapter 171 of this Title, the District Courts, ... shall have exclusive jurisdiction of civil actions on claims against the United States for money damages ... for ... personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Due Process Clause of Fifth Amendment

> No person shall ... be deprived of life, liberty, or property, without due process of law.

STATEMENT OF CASE

This is a claim under the Federal Tort Claims Act, 28 USC Sec. 1346(b), brought by an ex-serviceman to recover for injury received two months prior to discharge and resulting from surgery for the removal of a cervical rib (a congenital anomaly) undergone on the faulty advice of Army surgeons that removal would eventually become necessary. The surgery was performed in a military hospital, but was unrelated to military duty.

The claim was dismissed on motion on the authority of a Court-made exclusion which has had conflicting treatment in the circuits. The Court of Appeals for the Fifth Circuit affirmed.

ARGUMENT

I. CONFLICT BETWEEN CIRCUITS

Subject to provisions not hereto relevant, the Federal Tort Claims Act (FTCA) consents to suit against the United States for torts of government employees. 28 USC Sec. 1346(b).

In 1949 the Supreme Court held that a serviceman can recover under this act on a claim unconnected with the claimant's military service. Brooks v. U. S., 337 US 49, 69 SCt 918 (1949).

The following year, the Supreme Court held that a serviceman can NOT recover under the FTCA on a claim arising "incident to his military service." Feres v. U. S., 340 US 135, 71 SCt 153 (1950).

The Feres rationale was restricted by subsequent Supreme Court decisions. And in 1963 the Court stressed that Feres bars suits

arising "in the course of military DUTY." U. S. v. Muniz, 374 US 150, 83 SCt 1850 (1963).

The Court of Appeals for the Fifth Circuit holds to very broad language in excluding claims arising "incident to service." Shults v. U. S., 421 F2d 170 (1969), and instant case. This approach is very nearly tantamount to an exclusion of servicemen as a class, since most activities of servicemen are at least incident to their service.

On the other hand, the Court of Appeals for the Sixth Circuit follows the language and concept excluding only claims arising "out of or in the course of military duty." Hale v. U. S., 416 F2d 355 (1969).

The difference between the two circuits is not merely one of semantics. In Hale the

Court noted

> On the facts of this case, plaintiff's injury clearly "(arose) out of * * * activity incident to service." If this were the standard, as the District Court assumed it to be, we would have no hesitancy in affirming dismissal of the complaint. But, as indicated above, we do not think it is. (emphasis supplied.) 416 F2d at 359-360.

The Court should grant a writ of certiorari to resolve this conflict between circuits.

II. The Standards of Both Circuits Offend Due Process

Excluding military personnel from FTCA claims on the sole basis of military status - whether military duty status or military service status - offends the due process clause of the Fifth Amendment, which reads in pertinent part

> No person shall . . . be deprived of life, liberty, or property, without due process of law. (emphasis supplied.)

The right to equal treatment under law is included within the meaning of Fifth Amendment liberty. Bolling v. Sharpe, 347 US 497, 74 SCt 693 (1954).

Servicemen do not receive equal treatment with respect to tort claims against the government. Instead, they are the beneficiaries of a compensation scheme separate from but unequal to the FTCA rights available to other citizens.

There is inequality in the paternalism of having a compensation scheme as the sole remedy for a serviceman's tortious injury.

There is inequality in the inability of the serviceman to proclaim in a tort suit that he was injured by an improper, inefficient or harmful practice.

There is inequality in the serviceman's having to recognize that his body was a

chattel upon which military surgeons performed unnecessary surgery, and that he lacks full redress via a tort claim.

This unequal treatment of servicemen has been wrongly justified.

The unequal treatment has been justified by a comparison of compensation for servicemen with workmen's compensation. This analogy is faulty because servicemen do not enter and leave service at will, whereas a civilian can choose whether to seek employment in a job subject to workmen's compensation laws. It is doubly abusive to hold that since servicemen must take what they are given in the way of "employment", they must also take what they are given in the way of remedies for tortious injury by the government. Furthermore, the soldier by the government injured while enjoying the pastimes of leave is not barred

from a FTCA claim, though he receive compensation benefits. Brooks v. U. S., 337 US 49, 69 SCt 918 (1949). Nor is the veteran barred from a FTCA claim though he receive compensation. U. S. v. Brown, 348 US 110, 75 SCt 141 (1954).

The unequal treatment has also been justified on the premise that tort claims by servicemen would be destructive of military "discipline." If by destruction of discipline is meant that superior officers would be required to comport themselves in a lawful and careful manner, that result could indeed be anticipated from tort claims by servicemen. However, such a result would seem to be desirable, rather than unwelcome.

For the reasons stated, these justifications for unequal treatment are not sufficient to meet the Constitutional requirement that liberty,

including the right to equal treatment, may be taken away only with due process of law.

When President Johnson signed into law the Military Justice Act - 1968, he said, "The man who dons the uniform of his country today does not discard his right to fair treatment under law."

The constitutionality of excluding servicemen from FTCA claims arising incident to military service or even just incident to military duty, should be re-examined.

Respectfully submitted,

De Blieux, Guidry & Lowe
P. O. Box 3574
Baton Rouge, Louisiana 70821

BY: _____
J. D. De BLIEUX
of the Supreme Court Bar

CERTIFICATE OF SERVICE

I hereby certify that by airmail first class I have served three (3) copies of the foregoing Petition for Writ of Certiorari on all parties required to be served, namely: 1. Messrs. Morton Hollander and Robert M. Feinson, Attorneys at Law, Department of Justice, Washington, D. C. 20530; and 2. The Solicitor General, Department of Justice, Washington, D. C. 20530.

Baton Rouge, Louisiana, this 28th day of June, 1971.

J. D. De Blieux, of the
Supreme Court Bar

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30970

Summary Calendar*

CHARLES E. LOWE,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 31, 1971)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM: Appellant Lowe appeals the district court's order granting the government's motion to dismiss his suit brought under the Federal Tort Claims Act, Title 28, U.S.C., Section 1346(b), for in-

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*Rule 18, 5 Cir., See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

juries allegedly sustained while on active duty in the United States Army. We affirm.

On April 17, 1967, two months prior to the end of his enlistment, Lowe underwent elective surgery. The operation was performed by, and upon the advice of, military doctors at the U. S. Army Hospital, Fort Polk, Louisiana. Lowe allegedly suffered adverse effects from this surgery. Prior to Lowe's instituting the present suit, the Army administatively denied his claim for injuries on the ground that his claim was barred by the case law governing claims of servicemen for injuries occurring incident to their service. This determination was correct.

In *Shults v. United States*, 5 Cir. 1969, 421 F.2d 170, a serviceman was seriously injured in an automobile accident occurring away from his base and while he was on leave. He was taken to a military hospital where he died the next morning. The administrator of the estate filed a malpractice suit against the United States under the Tort Claims Act. Under the authority of *Feres v. United States*, 1950, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152, we affirmed the district court's dismissal of the complaint stating in part:

> "It is true that Shults was injured while on leave and that the leave was never formally cancelled prior to his death. Nevertheless, it is obvious that the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was there treated by Naval medical personnel solely be-

> cause of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be 'in the course of activity incident to service'." 421 F.2d at 171, 172.

The same conclusion must follow in the instant case. This result is not altered by the fact that the surgery here involved was "elective". It was nevertheless "activity incident to service".

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-355

CHARLES E. LOWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this action under the Federal Tort Claims Act, seeking recovery for personal injuries that he sustained while on active duty in the United States Army as a result of alleged malpractice by military doctors at the United States Army Hospital, Fort Polk, Louisiana. The district court dismissed the suit and the court of appeals affirmed (Pet. 12-14), on the authority of *Feres* v. *United States*, 340 U.S. 135.

In *Feres*, this Court held that the government is not liable under the Federal Tort Claims Act for injuries to members of the armed forces sustained incident to their service and resulting from the negligence of others in the armed forces. Like petitioner, two of the claimants involved in *Feres* sustained injuries allegedly caused by the medical malpractice of military doctors at military hospitals. Since the operative facts of this case are identical to those in *Feres*, the court below correctly dismissed petitioner's claim. Nor, contrary to petitioner's assertion (Pet. 5-7), is there a conflict of decisions. Without exception, the courts of appeals have held that *Feres* bars a serviceman's claim for injuries allegedly sustained as a result of malpractice at a military hospital. See, *e.g.*, *Henning* v. *United States*, No. 19,088, C.A. 3, decided July 13, 1971; *Buckingham* v. *United States*, 394 F. 2d 483 (C.A. 4); *Shults* v. *United States*, 421 F. 2d 170 (C.A. 5).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

[1] *Hale* v. *United States*, 416 F. 2d 355 (C.A. 6), on which petitioner relies, involved a claim arising from an automobile accident that occurred outside a military base. The court there explicitly recognized that *Feres* involved "quite different" circumstances and thus was distinguishable (416 F. 2d at 357).

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